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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 160

SPRINGFIELD, OHIO, LOCAL NO. 352, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

vs.

WILLIAM SETTOS, LESSEE OF LIBERTY THEATRE, D. B. A. LIBERTY THEATRE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. PADWAY,
HENRY KAISER,
Counsel for Petitioners.

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No.

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Petitioners,

vs.

WILLIAM SETTOS, LESSEE OF LIBERTY THEATRE, D. B. A. LIBERTY THEATRE.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Local No. 352 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Harold J. German, John Strong, Lloyd Blue, Claude E. Henkle, Robert Mills, John C. Lyons, John C. Cottrell and Arthur Wolfe, your petitioners, respectfully show this Honorable Court:

A.

Summary Statement of Matter Involved.

The individual petitioners are members of petitioner labor organization, Local No. 352 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, affiliated with the American Federation of Labor and the Ohio State Federation of Labor.

William Settos is the operator and lessee of a motion picture theatre called "The Liberty Theatre," in Springfield, Ohio, and employs two motion picture machine operators.

The theatre was closed for alterations for approximately six weeks in 1938. It reopened for business on October 14, 1938.

Prior to the scheduled reopening, representatives of Local No. 352 called upon Mr. Settos and requested that he employ union labor, and that he sign a contract with the union providing for employment of union members only and prescribing wages, hours and other working conditions. Mr. Settos refused to sign such an agreement.

Accordingly, on October 12th the union established a single picket who paraded up and down in front of the theatre, carrying a sign upon which were the words:

> "This theatre is unfair to Motion Picture Operators, Local No. 352."

It is undisputed in the pleadings, evidence and findings that the picket consisted of a single person, and that it was entirely peaceful, without the slightest use of force, violence, threats, intimidation, disorder, or the like.

On October 14, 1938, plaintiff below filed a petition (R. 4), and on the same day a temporary restraining order was issued without notice or hearing by the Court of Common Pleas of Clark County. This temporary order re-

strained petitioners, among other things, "from performing all other acts which may in any way injure or damage plaintiff in his business * * * and from all picketing of plaintiff's place of business, * * *" (R. 1).

An amended answer was filed by petitioners on December 21, 1938 (R. 9). Trial was had before the court on June 13, 1939. On February 6, 1940, the court issued a written decision (R. 12) in which he concluded:

> "The temporary restraining order heretofore issued will be made permanent" (R. 16).

Entry, in accordance with this decision, was filed February 23, 1940 (R. 3).

Thereafter, the case came on for trial on appeal on questions of law and fact before the Court of Appeals of Clark County, which rendered its decision on July 23, 1940 (R. 52), finding in favor of the plaintiff below, and entered its order and decree on September 17, 1940 (R. 51), enjoining and restraining petitioners from, among other things, "all picketing of Plaintiff's theatre * * *" (R. 51).

The cause was thereafter submitted to the Supreme Court of Ohio upon motion to direct the Court of Appeals to certify its record (R. 59) and upon an appeal as of right on the ground that debatable constitutional questions were involved (R. 58).

On February 26, 1941, the Supreme Court of Ohio ordered that the motion for an order directing the Court of Appeals of Clark County to certify its record be overruled (R. 58), and also ordered that appellee's motion to dismiss appeal filed as of right be sustained (R. 58), thereby affirming the order and decree of the Court of Appeals of Clark County.

Application for rehearing, timely filed (R. 62), was denied on March 19, 1941 (R. 57).

B.

Statement as to Jurisdiction.

Jurisdiction is invoked under Title 28, U. S. C. A., Section 344(b) (Judicial Code, Section 237(b) as amended by the Act of February 13, 1925.)

The Court of Common Pleas acknowledged in its written decision the argument made by defendants in their brief to the effect that under the constitutional right of "freedom of speech" the picketing in the instant case is constitutionally protected. This argument the court expressly rejected, relying solely on the fact that the plaintiff's employees were not members of the union, and there was no dispute between the plaintiff and his employees concerning wages, hours or working conditions. The court said:

> "As sacred and inviolable as the right of freedom of speech are the rights to personal liberty, property, the right of freedom to contract, and the right to carry on one's business in such manner as to him seems best, so long as he does not infringe upon the rights of others. That these rights are alike guaranteed by the fundamental law of the land and apply alike to all persons is so well established as to require no citations of authority to support it" (R. 15).

In the Court of Appeals of Clark County defendants repeated the arguments made before the lower court. Reference was made in submitted briefs to the cases of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, in support of the argument that states may not, under the Fourteenth Amendment, prohibit peaceful picketing. The court ruled on this question adversely to petitioners on the same ground as did the Court of Common Pleas. It considered "essential" that "the controversy" seemed to be between the "theatre

owner and the union" and not between the "proprietor and his employees", and held:

> "Under these conditions, there is no labor dispute which would, under the decisions, justify the union in picketing the property of the plaintiff in an attempt to force him to enter into a contract with the union" (R. 54).

The court relied exclusively on the case of *Crosby* v. *Raph* (sic), 136 O. S. 352, and quoted the following language from that decision:

> "The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights, equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights * * *" (R. 54).

Petitioners sought to obtain an appeal as of right to the Supreme Court of Ohio on the ground that it was "a case involving debatable constitutional questions" (R. 56), and also sought to obtain a review by way of a motion to certify the record. Assignments of error were filed in the Supreme Court of Ohio, which included, among other things, the following:

> "8. The decree of said court deprived the defendants and all members of the local union of liberty, freedom of speech, and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States" (R. 61).

The Supreme Court of Ohio overruled the motion to certify the record, and sustained appellee's motion to dismiss the appeal as of right. The journal entry referring to same recites in part as follows:

> "This cause came on to be heard upon the transcript of the record of the Court of Appeals of Clark

> County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause * * * Ordered, That a special mandate be sent to the Court of Appeals of Clark County, to carry this judgment into execution" (R. 58).

Thereafter, your petitioners filed an application for rehearing. This application pointed to the decisions of this Honorable Court in the cases of *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, No. 1, decided February 10, 1941, and *American Federation of Labor* v. *Swing*, No. 56, decided February 10, 1941, and after discussing the same concluded "these two decisions of the United States Supreme Court show as clearly as it is possible to show anything that the decisions of the Common Pleas Court and the Court of Appeals in the present case * * * deprive the appellants of constitutional rights of freedom of communication" (R. 64). The Supreme Court of Ohio denied the rehearing (R. 57).

Thus, from the beginning and throughout the litigation of this cause in the courts of Ohio the Federal question of freedom of speech was raised and passed upon by the courts. Throughout, your petitioners resisted the injunction on the ground that it was repugnant to the Fourteenth Amendment to the Constitution of the United States, in that it deprived petitioners of the right of freedom of speech.

The following cases are believed to sustain jurisdiction: *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra; Journeymen Tailors' Union, Local 195* v. *Millers, Inc.*, decided by Supreme Court of the U. S. March 3, 1941; *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

C.

The Question Presented.

Have the courts of Ohio deprived petitioners of their freedom of speech in violation of the Fourteenth Amendment to the Constitution of the United States?

D.

Reasons Relied on for Allowance of Writ.

The decision of the Court of Appeals of Clark County, Ohio, which the Supreme Court of Ohio has affirmed, determines a Federal question of substance in a manner directly at variance with the following applicable decisions of this Honorable Court: *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra; Journeymen Tailors' Union, Local 195* v. *Millers, Inc., supra; Thornhill* v. *Alabama, supra; Carlson* v. *California, supra.*

We deem it appropriate to advise this Honorable Court of the anomalous situation respecting the right peacefully to picket in the State of Ohio. In March of 1940, the Supreme Court of Ohio rendered a decision depriving a union of the right peacefully to picket solely on the ground that none of the union members were employed by the picketed establishment. (*Crosby* v. *Rath, supra.*) This Honorable Court denied certiorari to review this case on the same day that it announced its decisions in the *Swing* and *Meadowmoor* cases, *supra.* It is indisputable that the legal conclusions and the holdings in those two decisions applied to and were determinative of the issues involved in the *Crosby* case.

The Ohio Supreme Court's decision in the instant case, rendered sixteen days after the decisions in the *Swing* and *Meadowmoor* cases, ignored those decisions and reaffirmed

its initial position taken in the *Crosby* case. Possibly the State Supreme Court was not at that time aware of the *Swing* and *Meadowmoor* decisions. But petitioners applied for a rehearing (R. 62), and devoted the entire discussion in their application to this Honorable Court's holdings in the *Swing* and *Meadowmoor* cases pointing to their necessary conclusiveness on the issues raised by the instant case. Nevertheless, the Ohio Supreme Court denied a rehearing. Thus, working people in the State of Ohio are still denied the right peacefully to picket guaranteed by the Fourteenth Amendment to the United States Constitution as interpreted by this Honorable Court.

Unless this Honorable Court grants certiorari to review and set aside the judgment of the Supreme Court of Ohio, the working people of that state will not enjoy the same rights guaranteed by the same Constitution that are now enjoyed by working people in the State of Alabama (*Thornhill* v. *Alabama, supra*), California (*Carlson* v. *California, supra*), Illinois (*American Federation of Labor* v. *Swing, supra*) New Jersey (*Journeymen Tailors' Union, Local 195* v. *Millers, Inc., supra*) and, of course, all other jurisdictions subject to the Constitution of the United States.

Prayer for Writ.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Clerk of the Supreme Court of Ohio, commanding that Court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled "No. 28380-William Settos, Lessee of Liberty Theatre, d. b. a. Liberty Theatre, Plaintiff-Appellee, v. Springfield, Ohio, Local No. 352, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators

of The United States and Canada, et al., Defendants-Appellants," and that the judgment of the Supreme Court of Ohio, entered in the above entitled cause on February 26, 1941, affirming the decision of the Court of Appeals of Clark County, Ohio, by dismissing an appeal as of right on the ground that no debatable constitutional question was involved, may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

JOSEPH A. PADWAY,
HENRY KAISER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

SPRINGFIELD, OHIO, LOCAL NO. 352, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

vs.

WILLIAM SETTOS, LESSEE OF LIBERTY THEATRE, D. B. A. LIBERTY THEATRE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinions of the Court Below.

The decision of the Court of Appeals of Clark County is reported in 32 Ohio Law Abstract 219.

The judgment of the Supreme Court of Ohio dismissing the constitutional question is reported in full in 138 Ohio State 40, 32 N. E. (2d) 22.

B.

Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b), (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The petition for writ of certiorari sets forth in detail the manner and stage in the proceedings before all of the courts of Ohio in which the Federal question was raised, and the manner in which it was decided. Throughout, it was contended that the right peacefully to picket was guaranteed by the Fourteenth Amendment to the Constitution of the United States. The nature of this case and the rulings below clearly bring this case within the statutory provision above cited. The following cases, among others, sustain this Court's jurisdiction: *American Federation of Labor* v. *Swing*, No. 56, decided February 10, 1941; *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc.*, No. 1, decided February 10, 1941; *Journeymen Tailors' Union, Local 195* v. *Millers, Inc.*, decided by Supreme Court of the U. S. March 3, 1941; *C. I. O.* v. *Hague*, 59 Supreme Court 954; *Lovell* v. *Griffin*, 303 U. S. 444; *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

C.

Statement of the Case.

A summary statement of the case appears under the heading A in the petition for writ of certiorari and, in the interests of brevity, is incorporated here by reference.

D.

Errors Assigned.

1. That the courts of Ohio erred in failing to hold that the rights of the petitioners to free speech under the Fourteenth Amendment to the Constitution of the United States permitted them to inform the public of their grievances

against the Liberty Theatre by having a single person carry a banner in the public street in front of the theatre.

2. That the Supreme Court of Ohio erred in failing to review and reverse the following judgment and decree of the Court of Appeals of Clark County:

> "It is therefore ordered, adjudged and decreed that the Defendants-Appellants, and each of them, and all members of Local No. 352 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, be hereby enjoined and restrained from all picketing of Plaintiff's theatre, from any and all boycotting or attempts to boycott said theatre, and from in any way injuring or damaging Plaintiff in his business of operating a moving picture theatre; and this cause is remanded to the Common Pleas Court of Clark County for execution of this decree and for any further proceedings according to law."

E.

ARGUMENT.

The identity in principle of the instant case with several cases recently decided by this Honorable Court eliminates the need for elaborate argument. There is no conceivable point of distinction between this case and the cases of *American Federation of Labor* v. *Swing, supra; Milk Wagon Drivers' Union* v. *Meadowmoor Dairies, Inc., supra;* and *Journeymen Tailors' Union, Local 195,* v. *Millers, Inc., supra.*

In the *Swing* case, as here, all picketing, including peaceful picketing, was enjoined on the ground that there was no dispute between the employer and his immediate employees. This Honorable Court reversed the decree and said:

> "All that we have before us, then, is an instance of 'peaceful persuasion' disentangled from violence and free from 'picketing *en masse* or otherwise con-

ducted' so as to occasion 'imminent and aggravated danger'. *Thornhill* v. *Alabama*, 310 U. S. 88, 105. We are asked to sustain a decree which for purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478."

The case of *Journeymen Tailors* is equally applicable. In that case this Honorable Court, in a *per curiam* decision granted certiorari and reversed the decision of the Supreme Court of New Jersey which affirmed an injunction restraining peaceful picketing by a union because of the absence of a controversy between the employer and his immediate employees.

The holding in the *Meadowmoor* case is to the same effect. Though in that case this Honorable Court sustained the injunction issued by the state court, it did so solely because the picketing in that case was not peaceful but rather enmeshed in a background of substantial and continued violence. In the instant case there is not the slightest semblance of violence or unlawfulness in the conduct of the single picket involved. It is undisputed in the pleadings, findings and conclusions that the picket was entirely peaceful. Under the doctrine pronounced in the foregoing cases, as well as in the leading cases of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106, the affirmance of the decree in the instant case by the Supreme Court of Ohio is clearly repugnant to the Fourteenth Amendment to the Constitution of the United States.

Evidently, however, the Supreme Court of the State of Ohio persists in ignoring the holdings of this Honorable Court and the restrictions imposed upon it by the Constitution of the United States. The decision of the Court of Appeals was expressly premised on the case of *Crosby* v. *Rath*, 136 O. S. 352. In that case the Ohio court, like the Illinois court in the *Swing* case, relied exclusively on the fact that the employees of the picketed establishment were not members of the union, and that there was no controversy over wages, hours or conditions of work between the employer and his immediate employees.

Certiorari was requested of this Honorable Court to review the *Crosby* v. *Rath* decision. On February 10, 1941, the request was denied (*Rath* v. *Crosby*, No. 187). On the

same day this Honorable Court announced its decision in the *Swing* and *Meadowmoor* cases.

It is apparent that, whatever other grounds there may have been for denying the writ in the *Crosby* case, the *Meadowmoor* and *Swing* cases, decided on the same day, covered the *Crosby* situation. Certain it is that the courts of Ohio are subject to the same Federal Constitution and its interpretation by the Supreme Court of the United States as are the courts of Illinois and other States.

The decision of the Supreme Court of Ohio in the instant case was rendered on February 26, 1941, sixteen days after this Honorable Court's decisions in the *Swing* and *Meadowmoor* cases were rendered. Conceivably, the Ohio Supreme Court was not apprized of the existence of these decisions in that short period when it rendered its original decision. But petitioners expressly called these decisions to the attention of the court in their application for rehearing. The application was exclusively devoted to a discussion of those two decisions and their clear and controlling effect upon the instant case. The Supreme Court of Ohio, in the face of these clearly applicable and determinative decisions, denied the rehearing.

Organized labor, therefore, appeals to this Honorable Court to safeguard its basic constitutional rights in the State of Ohio.

Respectfully submitted,

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AUG 4 1941
CHARLES ELMORE CROPLEY
CLERK

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OCTOBER TERM, 1941.

No. 160.

SPRINGFIELD, OHIO, LOCAL No. 352, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

vs.

WILLIAM SETTOS, LESSEE OF LIBERTY THEATRE, D. B. A. LIBERTY THEATRE,

BRIEF OF RESPONDENT CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 160.

SPRINGFIELD, OHIO, LOCAL No. 352, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, ET AL.,

Petitioners,

vs.

WILLIAM SETTOS, LESSEE OF LIBERTY THEATRE, D. B. A. LIBERTY THEATRE,

---

BRIEF OF RESPONDENT CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OF FACTS.

The respondent, William Settos, operates, as lessee, a motion picture theatre in the city of Springfield, Ohio, known as the Liberty theatre. He employed two employees, one of whom was Everett Thacker, who had

been in his employ eight or nine years (R., 31), and the union had never suggested to the respondent during that time that they would accept as a member of their union, said Everett Thacker (R., 30). At the time the petitioner, Springfield, Ohio, Local No. 352, made its demands upon the respondent that he sign a contract with it, it had only fourteen members and there were no union motion picture operators out of employment and available to the respondent, for employment in the city of Springfield, Ohio (R., 19, and petitioner's amended answer in the trial court, R., 10). The contract tendered to respondent was substantially similar to Respondent's Exhibit "A" in the trial court (Introduced R., 22, R., 41, 42 and 43). There were nine motion picture houses in the city of Springfield, Ohio, and seven of them employed union labor under contract with the petitioner, Local No. 352. Under Clause 8 of the contract presented to respondent all seven of these theatres would have been required to employ four operators. After the issuance of the temporary restraining order by the trial court the union, by its representatives, Arthur W. Lyday and Arthur H. Fix, by letter dated October 26, 1938, proposed to respondent a different contract by which they proposed to accept into membership in their union one of the respondent's two motion picture operators, namely, Mr. Everett Thacker (R., 28).

ARGUMENT.

A. The Petition for a Writ of Certiorari Should Be Dismissed Because It Does Not Appear from the Record That Any Substantial Federal Question Is Involved.

It must appear affirmatively from the record, not only that the federal question was presented to the highest state court, but that a decision on the federal question was necessary to determination of the cause.

Honeyman v. Hanan, 57 S. Ct., 350, 352; 300 U. S., 14, 18; 81 L. Ed., 476, 479.

In **Lynch v. New York**, 55 S. Ct., 16, 17; 293 U. S., 52, 54; 79 L. Ed., 191, 193, this honorable court said:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs or statements which are not part of the record.
>
> It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

See also, **Public Service Commission of Wisconsin v. Wisconsin Telephone Company**, 309 U. S., 657; 60 S. Ct., 515, and **Joseph D. McGoldrick v. Gulf Oil Corporation**, 309 U. S., 2, 3; 60 S. Ct., 375; 84 L. Ed., 536, where this honorable court said:

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of

> the tax solely because of violation of the federal Constitution we are unable to find that the decision of the highest court of the state did not rest upon an adequate non-federal ground."

The record in this case shows conclusively that no federal question was presented by the defendant-petitioners in either the trial court or the Court of Appeals of Clark county, Ohio. The defendant-petitioners' answer (R., 7) does not raise any federal question. The defendant-petitioners' amended answer (R., 9), which added a fourth defense, not only does not raise any federal question, but by comparison to their answer was an attempt to bring themselves within the law of Ohio as it then existed, by alleging facts which it hoped would constitute a labor dispute, so that peaceful picketing under the **then** Ohio law would have been permissible. The motion for a new trial in the trial court does not raise any federal question (R., 16). It is to be noted that the defendant-petitioners' appeal (R., 17) to the Ohio appellate court is on questions of law and fact, which entitle defendant-petitioners to a trial de novo. Thus, in the appellate court defendant-petitioners could have filed a new or amended answer raising the alleged federal question, but they did not see fit to do so. Their motion for a new trial in the Court of Appeals of Clark county, raises no federal question (R., 55). It is respectfully submitted that neither the opinion of the trial court, Owen, J. (R., 12, 16) nor the opinion of the Court of Appeals of Clark county, Ohio (R., 52, 55) is properly part of the record before this court nor are these opinions part of the record under Ohio procedure. In the case of **Summers v. Thomas Manufac-**

turing Company, 82 O. S., 338, at page 346, the court states:

> "While it is true that judicial opinions do not constitute a part of the record and that a resort cannot be had to them in reviewing courts as the predicate of errors, the relation of judgment to evidence contained in the record is obviously a proper consideration."

The opinions of the trial and appellate courts not being part of the record, are not subject to consideration in error proceedings. Baldwin v. State, 23 O. L. Abs., 147, 157; appeal dismissed in 132 O. S., 302, 7 N. E. (2d) 229, which has appeal dismissed in Painter v. Ohio, 301 U. S., 667; 57 S. Ct., 932; 81 L. Ed., 1332. See, also, Treiber v. Jaster, 55 O. App., 64, 8 N. E. (2d) 581, motion to certify the record to the Supreme Court of Ohio overruled February 3, 1937. Perhaps one of the strongest cases on this point is Will v. McCoy, 135 O. S., 241, 242; 20 N. E. (2d), 371, 372, where the opinion and the journal entry of the Court of Appeals were inconsistent. The Supreme Court of Ohio in that case, at page 242, stated:

> "As a preliminary matter it should be observed that the opinion and journal of the Court of Appeals are not in agreement. According to the journal, the judgment of the trial court was reversed upon the single ground of error in the charge; but the majority opinion includes the additional statement that the verdict is against the weight of the evidence. It is, of course, elemental that a court speaks through its journal. Consequently, when a court's opinion and journal are in conflict, the latter controls and the former must be disregarded."

See also, In re Estate of Ury, 20 O. L. Abs., 226, application for rehearing denied, 20 O. L. Abs., 640.

Section 12223-8 of the General Code of Ohio, Page's General Code Annotated, Volume 9, is as follows:

> "Sec. 12223-8, Transcript of Record. Within ten (10) days after filing the notice of appeal, or the order allowing the appeal or a certified copy thereof, where permission to file the appeal is required, the clerk of the court from which the appeal is taken or a judge thereof, shall, upon being paid the lawful fees and the filing of a praecipe therefor, prepare and file in the court to which the appeal is taken a transcript of the docket or journal entries with such original papers or transcripts thereof as are necessary to exhibit the error complained of. The transcript of the testimony or bill of exceptions or so much thereof as may be necessary for said appeal may be filed within such time as is provided for in the rules of court. In event the transcript and papers are not filed within said time either party may apply to the court to which the appeal is taken to have the case docketed and the court shall order them filed."

This section of the Ohio General Code defines what constitutes the record of a case in Ohio. This contention is supported by the case of Simes v. Dayton-Xenia R. R. Company, 24 O. L. Abs., 595, 597.

Thus, according to the record presented to the Supreme Court of Ohio and presented to this court, no federal question had been raised, either in the Common Pleas Court of Clark county or in the Court of Appeals of Clark county. The first time that the petitioners for a writ of certiorari attempted to raise a federal question was in their assignment of errors filed in the Supreme Court of Ohio on October 17, 1940, being specific assignment No. 8 of the errors therein set forth (R., 61).

It is the undisputed law of Ohio that error proceedings in the Supreme Court are properly dismissed where a constitutional question claimed to be involved in the

case has not been submitted to nor decided by the Court of Appeals. 2 Ohio Jurisprudence, Section 142, Appeal and Error. See, also, 2 Ohio Jurisprudence, Section 544, Appeal and Error, which is as follows:

> "No constitutional question involved: A proceeding in error brought to the supreme court as a matter of right on the claim that a constitutional question is involved will be dismissed if that court finds that no such question, or none which is debatable, is actually involved or if the record discloses that the case can be disposed of without entering upon the consideration of any constitutional question, or that the constitutional question claimed to be involved in the case was not submitted to nor decided by the court of appeals."

The text of Ohio Jurisprudence is borne out by the following cases in the Supreme Court of Ohio:

Hoffman v. Staley, 92 O. S., 505; 112 N. E., 1084;
Zimmerman v. Morris Plan Bank, 113 O. S., 703, 150 N. E., 920;
Cuthbertson v. State, 106 O. S., 658, 140 N. E., 941;
Thatcher v. Penn. O. & D. R. Co., 121 O. S., 205, 167 N. E., 682;
Clarington v Althar, 122 O. S., 608, 174 N. E., 251.

The judgment of the Supreme Court of Ohio which is sought to be reviewed by this petition for a writ of certiorari contains no language from which it can be definitely stated that the federal question which petitioners had sought to raise by their eighth assignment of error, had been considered. The court merely states:

> "On consideration whereof it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said case." (R., 58.)

It is, therefore, respectfully submitted that the Supreme Court of Ohio may and probably did dismiss the appeal, so far as the eighth assignment of error was concerned, because the federal question involved in the eighth assignment of error had not been raised in either the trial court or the Court of Appeals and did not appear from the record before the Supreme Court of Ohio. The phrase, **no debatable constitutional question**, as used by the Supreme Court of Ohio, has no greater import than the phrase, **no substantial federal question**, frequently used by this court.

The federal question must be raised at the time and in the manner required by the established and reasonable practice of the state.

> Penn. Railroad Co. v. Illinois Brick Co., 297 U. S., 477, 56 S. Ct., 556, 80 L. Ed., 796.

We are familiar with the rule of law of the Supreme Court of the United States that if the judgment of the highest state court shows conclusively that the federal question involved had been decided by it and was necessary to its decision that this honorable court will entertain a petition for certiorari and grant the same. This rule of law is illustrated by the cases of

> Hetrick v. Village of Lindsey, 68 L. Ed., 1065, 1066, 265 U. S., 384, 386, 44 S. Ct., 486.
> Matthews v. Huwe, 70 L. Ed., 266, 267, 269 U. S., 262, 265, 46 S. Ct., 108;
> Van Huffel v. Harkelrode, 284 U. S., 225, 230, 76 L. Ed., 256, 261, 52 S. Ct., 115.

However, in these cases the constitutional question was timely raised in the trial court and, therefore, was properly in the record submitted to the Supreme Court of Ohio. The case at bar is distinguishable, therefore, and

should not come within the rule thus announced as there was no constitutional question in the record when the case was presented to the Supreme Court of Ohio except the defendant-petitioners' eighth assignment of error which was not involved in the record below and could not be considered by the Supreme Court of Ohio.

Therefore, it is respectfully submitted that it does not appear affirmatively that the federal question was presented to the Supreme Court of Ohio or that a decision of the federal question was necessary to sustain the judgment of the Supreme Court of Ohio for the Supreme Court of Ohio could properly dismiss the appeal because a federal question had not been raised below.

As a final authority on the jurisdictional question it is submitted that the case of **American Federation of Labor v. Swing**, 85 L. Ed., 513, supports our contentions. A careful reading of this case shows that, although the Supreme Court of Illinois in its decree, affirming the appellate court, one of Illinois' intermediate courts of review, on the question of the preliminary injunction, stated that the complaint properly invoked equity for three reasons: (1) there was no dispute between the employer and his immediate employees, (2) the placards were libelous, (3) they were acts of violence, this court refused to go beyond the final decree of the appellate court which did not embody the language of the Supreme Court of Illinois in affirming the appellate court on the question of the preliminary injunction. This court refused to go outside of the record as presented to it. In that case the petition was for a writ of certiorari to the Supreme Court of Illinois which had dismissed a writ of error to review the final decree of the Court of Appeals of Illinois. This court, therefore, looked only to the lan-

guage of the final decree of the Court of Appeals of the state of Illinois and found therein language which was so broad and all embracing that it came to the conclusion that it rested upon the explicit avowal that peaceful persuasion was forbidden in that case solely because those who were enjoined were not in the defendant's employ. This honorable court then says that it would be improper to dispose of the case otherwise than on the face of the decree which is the judgment now under review.

Applying the reasoning of the **Swing** case to the case at bar, in the case at bar, the Supreme Court dismissed defendant-petitioners' appeal as of right, which is comparable to the Illinois petition in error, on the ground that there was no debatable constitutional question involved. This honorable court will then look to the decree of the appellate court of Ohio (the Court of Appeals of Clark county) to see what decree it has issued, and will find (R., 51) that the decree of the Court of Appeals of Clark county is as follows:

> "This cause came on for trial upon the pleadings, evidence and argument of counsel; the court upon the consideration thereof find on the issues joined for the plaintiff appellee and that the plaintiff is entitled to relief by injunction."

If this honorable court should desire to look further in the record it will find that the decree of the trial court is in substantially the same language (R., 3). Therefore, from the record of this case properly before this honorable court, it is impossible to find that any of the courts of Ohio considered a federal question and decided it adversely to the defendant-petitioners.

Wherefore, it is respectfully submitted that this honorable court should not take jurisdiction in the instant case and that the petition for a writ of certiorari should be denied.

B. There Is No Substantial Federal Question Involved in This Case Because the State Injunction Did Not Deprive the Defendant-Petitioners of Any Personal Liberty Guaranteed to Them Under the Fourteenth Amendment.

The recent pronouncements of this honorable court have in many instances changed the conception of the constitutional rights involved in picketing. Many of the states of the Union, like Ohio, had formerly held under their state laws that picketing was unjustified and, hence, would be enjoined unless there was an actual dispute between the employees and their employer. The first two cases decided by this court to radically change this conception of the law were the cases of **Thornhill v. Alabama**, 310 U. S., 88, 60 S. C., 736, and **Carlson v. California**, 310 U. S., 106, 60 S. Ct., 746. These cases involve respectively a statute of Alabama and an ordinance of Shasta county, California. In both of these cases this honorable court found that the state statute and ordinance were so sweeping in their terms that they were unconstitutional by depriving residents of the state and county, respectively, of rights, privileges and immunities granted to them by the Fourteenth Amendment of the Federal Constitution and, therefore, the laws were stricken down by this court. However, we submit that this court made certain statements in **Thornhill v. Alabama**, supra, which proved conclusively that this honorable court did not intend to hold, that no state statute or ordinance forbidding picketing could be constitutional if the same were drafted to apply to particular instances which would justify the curtailment of the rights of free

speech. In **Thornhill v. Alabama**, supra, this court stated, at page 1100 of 84 Law Ed.:

> "The statute as authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the prescribed activity or peaceful character of their demeanor, the nature of their dispute with an employer or the restraining character and the accurateness of the terminology used in notifying the public of the facts in dispute."

It is submitted that Mr. Justice Murphy in that statement, by inference suggested that there might be occasions where the freedom of speech might be properly curtailed, due to the **number** of persons engaged in the picketing, the **non-peaceful** character of their demeanor, **nature** of their dispute with an employer, and the **unrestrained** character and **inaccurateness** of the terminology used in notifying the public of the facts of the dispute. Again, on page 1104, 84 Law Ed., the court states:

> "The power and duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives and property of its residents cannot be doubted."

On February 10, 1941, this honorable court decided the cases of **American Federation of Labor v. Swing**, 85 L. Ed., 513, and **Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.**, 85 L. Ed., 497. The **Swing** case, supra, presents the following question: Is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding the resort to peaceful persuasion through picketing merely because there was no immediate employer-employee dispute? The question was answered in the affirmative and such a broad

common law policy of a state was held to be unconstitutional.

The **Meadowmoor case**, supra, stands for the proposition that peaceful picketing may be enjoined under certain circumstances, namely, when there has been a background of violence. The language of the court in that case, and in **Thornhill v. Alabama**, supra, is broad enough to include other circumstances than violence alone, which would justify the issuance of an injunction against peaceful picketing.

In **Milk Wagon Drivers Union v. Meadowmoor**, supra, at page 499, 85 L. Ed., the court says:

> "Such a decree arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance."

On the same page the court says:

> "Back of the guaranty of free speech lay faith in the power of an appeal to reason by all peaceful means for gaining access to the mind."

And on page 500, 85 Law Ed., the court further says:

> "Nor can we say that it was written into the Fourteenth Amendment that a state through its courts, cannot base protection against future coercion on an inference of the continuing threat of past misconduct."

The court cites **Ethyl Gasoline Corporation v. U. S.**, 309, U. S., 436, 85 Law Ed., 852, 60 S. Ct., 618, and, again on the same page states:

> "Certainly a state is not confined by the Constitution to narrower limits in fashioning remedies for dealing with industrial disputes than the scope of

discretion open to the National Labor Relations Board."

And again, on page 502, 85 Law Ed., the court says:

"An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberty as is Justice Cardozo."

The language of Mr. Justice Murphy, already quoted in the case of **Thornhill v. Alabama**, supra, clearly indicates that freedom of speech might be properly curtailed, based on an unreasonable number of persons engaged in the prescribed activity, the violent character of their demeanor, the nature of the dispute with the employer or the unrestrained character and inaccurateness of the terminology used in notifying the public of the facts of the dispute. This court in the **Meadowmoor** case, supra, approves the following language of Mr. Justice Murphy in the **Thornhill** case, supra.

"It is apparent that one or the other of the offenses comprehend every practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of an employer."

Can it be said that the evidence before the courts of Ohio in the instant case would not have justified the injunction granted under the circumstances of the instant case? As stated by this honorable court, in all of the recent cases on the question of free speech, the doctrine is justified on the basis that it is the dissemination of facts for the purpose of gaining access to the mind which is vitally important. In the instant case, the banner carried by the picket bore the legend:

"This theatre is unfair to motion picture operators, Local No. 352."

Bearing in mind that the picketing commenced upon the refusal of the respondent, William Settos, to sign the contract presented to him by Local No. 352, introduced in evidence (R., 22) (Respondent's Exhibit A, R., 41, 42, 43) what impartial person would say that Mr. Settos, doing business as the Liberty Theatre, was unfair to Local No. 352 because he refused to sign that contract? What unbiased person would say that Mr. Settos was unfair because he refused to employ union motion picture machine operators supplied by party of the second part, Local No. 352? What impartial person would say that Mr. Settos was unfair to Local No. 352, when he refused to sign a contract which was based upon the by-laws and working rules of the other party to the contract, not embodied therein, or which was subject to the rules and regulations of the International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, when such rules and regulations were not presented to him? (Subparagraph 4 of Respondent's Exhibit A.) What unbiased person would say that Mr. Settos was unfair to Local No. 352 because he did not discharge his two employees, one of whom had been with him eight or nine years, and employ only motion picture machine operators supplied to him by Local No. 352? What unbiased person would say that Mr. Settos was unfair to Local No. 352 because he wished to have something to say about the character, personal appearance and other personal characteristics of his two employees with whom he was intimately and daily associated? What unbiased person would say that Mr. Settos was unfair to Local No. 352 by refusing to sign a contract which Local No. 352 could not fulfill? The amended answer of Local No. 352 admits that it consisted of

fourteen members and two apprentice members. This amended answer was filed December 21, 1938 (R., 3) and comparing the admission of the amended answer with the testimony of Mr. Strong, together with the stipulation by Mr. Keifer, counsel for Local No. 352, in the trial court (R., 22) it is apparent that one of the apprentice members had been taken into the union after the issuance of the temporary restraining order and that the other alleged apprentice was not a member but that his application was still pending. Thus, it is apparent that at the time the union offered this contract to Mr. Settos it had only fourteen members. The defendant-petitioners in their amended answer (R., 11) denied that said Local No. 352 ever requested plaintiff to discharge any of his employees. This denial in the amended answer is not borne out by the terms of the contract presented to Mr. Settos (Respondent's Exhibit A; R., 41, 42, 43) nor is it borne out by the letter dated October 26, 1938, written by Mr. Arthur W. Lyday and Arthur H. Fix (Respondent's Exhibit D; R. 47, introduced in evidence, R. 28). This letter clearly indicates that Local No. 352, after the restraining order had been granted and picketing had ceased, was offering some concessions to Mr. Settos, one of those being that it would accept into membership one of his employees, named Mr. Thacker. The letter, by inference, refuses to accept the other employee.

Let it be remembered that the evidence in this case shows conclusively that this is not a dispute where the union had attempted to unionize the respondent's employees and had failed as the evidence clearly shows that the union had never attempted, prior to demanding that Mr. Settos sign the contract submitted to him and picketing his place of business, to persuade his employees t

join the union. The evidence further shows that the union was not in position to fulfill the contract had Mr. Settos signed it, as it did not have sufficient members to furnish the employees to Mr. Settos and that it was asking Mr. Settos to sign an unfair contract which it was not demanding of the other seven moving picture houses which employed union labor in the city of Springfield. This contention is borne out by the fact that each of the other seven moving picture houses which employed union labor under the alleged uniform contract would have been required to employ four operators which would have required at least twenty-eight members of the union (R., 32, 33). The record in this case also shows conclusively that the union resorted to threats in order to coerce and intimidate Mr. Settos into signing the contract submitted to him. (Mr. Settos' testimony, R. 33, 34. Also admissions in defendant-petitioners' amended answer, R. 10.)

This honorable court, in the **Meadowmoor** case, supra, at page 500 Law Ed., stated:

> "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois, speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guaranty here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority."

In view of the decree of the trial court and the Court of Appeals in this record, which are to the effect only that the court finds on the issues joined for the plaintiff and that the plaintiff is entitled to relief by injunction,

can it be said that there are no equitable doctrines involved which on the state of the record and the local situation before the trial court would justify the injunction? We submit that it cannot so be said, for, as heretofore pointed out, the evidence included threats of coercion, inequitable demands and false statements of the situation as revealed by the evidence and a failure on the part of Local No. 352 and its members to use picketing as a method of communicating **facts** of the dispute to the public as the record clearly shows that the union attempted to give the public no **facts** concerning the dispute. It is one of the fundamental maxims of equity that one seeking equity must come into equity with clean hands and who can say that it is equitable on the part of organized labor to seek the discharge of two satisfied employees who do not belong to their union, or any other, without giving them every opportunity to join the union.

On the same day that this honorable court decided the **Swing** and **Meadowmoor** cases, supra, it denied a writ of certiorari to the Supreme Court of Ohio to review **Crosby v. Rath**, 136 O. S., 352. The defendant-petitioners would give this honorable court the impression that the Supreme Court of Ohio has ignored and is continuing to ignore the holdings of this honorable court as pronounced in the **Swing** and **Meadowmoor** cases, supra. It is respectfully submitted that that is not the case and that the Supreme Court of Ohio will follow the pronouncements of this honorable court in all cases coming within the doctrines of the **Swing** and **Meadowmoor** cases. While it may be idle to speculate as to why this honorable court denied the writ of certiorari in the case of **Crosby v. Rath**, supra, it is submitted that in view of the facts of that case as applied to the **Meadowmoor** case, this honorable

court could not have done otherwise. While the Supreme Court of Ohio, in the **Crosby** case did lay down the law of Ohio as forbidding even peaceful picketing, unless there was a relation of employer and employee, the facts of the **Crosby** case show that there had been a background of violence similar to that of the **Meadowmoor** case. Therefore, in view of the pronouncement in the **Meadowmoor** case, this honorable court could not have properly reversed the Supreme Court of Ohio in the **Crosby** case and in view of the pronouncements of the **Swing** case this honorable court had already indicated to the Supreme Court of Ohio what the law of the land was from that time forward so far as peaceful picketing might be concerned as a general proposition of law. The Supreme Court of Ohio properly denied the defendant-petitioners' application for a rehearing in spite of the fact that the **Swing** and **Meadowmoor** cases were expressly called to its attention for as heretofore pointed out, under Argument A, the federal question had not been properly presented to the Supreme Court of Ohio by the record on the appeal to the Supreme Court of Ohio and, secondly, the Supreme Court of Ohio properly felt that the peculiar circumstances developed by the record in the instant case caused it to fall within one or the other of the exceptions to the **Swing** case which had been set forth by this honorable court in the **Meadowmoor** case and in **Thornhill v. Alabama**.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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